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SUBJECT: DISPUTE SETTLEMENT BODY

1. SUMMARY: At its meeting on September 27, 2005, the WTO Dispute Settlement Body ("DSB") heard statements regarding the status of implementation from the United States in United States - Section 211 Omnibus Appropriations Act of 1998; United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan; United States - Continued Dumping and Subsidy Offset Act of 2000; and United States - Section 110(5) of the US Copyright Act of 2000. The DSB heard statements from Australia, Brazil, and Thailand in European Communities - Export Subsidies on Sugar, adopted the panel report in United States - Countervailing Measures Concerning Certain Products from the European Communities: Recourse to Article 21.5 of the DSU by the European Communities, and adopted the panel and Appellate Body reports in European Communities - Customs Classification of Frozen Boneless Chicken Cuts. The DSB also approved the re-appointment of Messrs. Baptista, Lockhart, and Sacerdoti as members of the Appellate Body. END SUMMARY.

2. The WTO Dispute Settlement Body met at 10 am on September 27, 2005, under the chairmanship of Ambassador Eirik Glenne (Norway) to consider the following agenda items:

(1) Surveillance of Implementation of Recommendations Adopted by the DSB

1A. United States - Section 211 Omnibus Appropriations Act of 1998 (WT/DS176/11/ADD.35)

1B. United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (WT/DS184/15/ADD.35)

1C. United States - Continued Dumping and Subsidy Offset Act of 2 (WT/DS217/16/ADD.20 - WT/DS234/24/ADD.20)

1D. United States - Section 110(5) of the U.S. Copyright Act (WT/DS160/24/1DD.10)

(2) European Communities - Export Subsidies on Sugar: Implementation of DSB Recommendations and Rulings

1A. Communication from Australia, Brazil and Thailand (WT/DS265/32 - WT/DS266/32 - WT/DS283/13)

(3) United States - Countervailing Measures Concerning Certain Products from the European Communities: Recourse to Article 21.5 of the DSU by the European Communities

1A. Report of the Panel (WT/DS212/RW)

(4) European Communities - Customs Classification of Frozen Boneless Chicken Cuts

1A. Report of the Appellate Body (WT/DS269/AB/R-WT/DS286/AB/R) and Reports of the Panel (WT/DS269/R; WT/DS286/R)

(5) Appointment of Appellate Body Members

3. The agenda was adopted without amendment. The United States intervened on items 1, 3, and 4, per instructions (summarized below). The complete text of all U.S. statements can be found on the website of the U.S. Mission in Geneva, [us.mission.ch/press2005.html](http://us.mission.ch/press2005.html)

(1) Surveillance of Implementation of Recommendations Adopted by the DSB

1A. United States - Section 211 Omnibus Appropriations Act of 1998

4. The United States noted that several legislative proposals relating to Section 211 have been introduced in the current U.S. Congress and said that it is working with

the U.S. Congress to implement the DSB's recommendations and rulings. Regarding the EC's statements at the last DSB meeting, the U.S. failed to understand how its commitment to implement the DSB recommendations and rulings in this dispute and its efforts to comply could undermine the "authority" of the TRIPS Agreement. To the contrary, these affirm Members' commitments to the TRIPS Agreement.

15. The European Communities noted that there are two disputes on the agenda for the present meeting in which the U.S. has failed to comply with its TRIPS Agreement obligations within the reasonable period of time for doing so. As a main sponsor of that Agreement, the U.S. unwillingness to comply undermines the authority of that agreement. Adoption of one of the four bills to repeal Section 211, which are pending before Congress, would resolve this dispute.

16. Cuba said that the June 30 agreement between the U.S. and EC in this dispute is a "shameful cave-in" on the part of the EC which allows the U.S. to continue to violate its WTO obligations by applying Section 211. It called on the DSB to end its "complacent toleration of this flagrant lack of compliance" by the U.S. and encouraged the U.S. to repeal Section 211.

17. China regretted that the U.S.-EC agreement did not contain a deadline for implementation. Implementation would be to the U.S. benefit. It applauded the U.S. implementation in the 1916 Act dispute and urged the U.S. to use that momentum to bring its remaining WTO-inconsistent measures into conformity.

18. Canada said that as the aim of dispute settlement system is to secure a positive solution to a dispute that is mutually acceptable to the parties (DSU Article 3.7), Cuba's reference to the U.S.-EC agreement as "shameful" is a departure from how that system is conceived. If Cuba considers that it has legitimate rights in this dispute, it can initiate a dispute on its own.

19. Cuba replied that it was not challenging the right of the parties to enter into an agreement no matter how shameful. The U.S.-EC agreement was concluded behind closed doors and without consultations. Cuba is aware of its rights.

110. The DSB took note of the statements and agreed to revert to this matter at its next meeting.

#### 1B. United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan

111. The United States noted that as of November 23, 2002, U.S. authorities had addressed the DSB's recommendations and rulings regarding the calculation of anti-dumping margins at issue in this dispute. It said that legislation has been introduced in the current U.S. Congress that would implement the remaining DSB recommendations and rulings with respect to the U.S. antidumping statute and that the House Ways and Means Committee is currently reviewing public comments on H.R. 2473 which it requested to be submitted by September 2. The U.S. Administration is working with Congress on the timely passage of such legislation.

112. Japan recalled that it has reserved its rights under DSU Article 22.2 and encouraged the U.S. to comply with its WTO obligations.

113. The DSB took note of the statements and agreed to revert to this matter at its next meeting.

#### 1C. United States - Continued Dumping and Subsidy Offset Act of 2000

114. The United States said that the U.S. Administration proposed the repeal of the Continued Dumping and Subsidy Offset Act (CDSOA) in its budget proposal for FY2006 and that legislation that would repeal the CDSOA was introduced in the U.S. House of Representatives. The Ways and Means Committee is reviewing public comments on whether to include that legislation in a broader trade bill and, on September 9, an amendment to appropriations legislation was filed in the U.S. Senate which would prohibit the distribution of CDSOA funds unless they are not otherwise inconsistent with U.S. WTO obligations. The United States will work with the U.S. Congress on legislation that would repeal the CDSOA and will confer with the complaining parties to reach mutually satisfactory solutions.

115. The European Communities recalled various recent Congressional initiatives with respect to the CDSOA and encouraged its repeal without delay.

116. Canada regretted that the retaliatory measures imposed by various Members were necessary so close to the Hong Kong

Ministerial. It urged the passage of H.R. 1121 and welcomed an explanation of the amendment to Appropriations Legislation H.R. 2862.

¶17. Japan said that the proposed amendment to the U.S. Appropriations Legislation could have been a significant step, but understood that it was not introduced in the Senate. Recalling that along with Canada, the EC, and Mexico, it is imposing retaliatory measures on the U.S., it called for a prompt repeal of the CDSOA.

¶18. Brazil said that the U.S. has shown no real progress on its implementation of the DSB's recommendations and rulings in this dispute and asked for an elaboration of the U.S. next steps with respect to the September 9 amendment.

¶19. The DSB took note of the statements and agreed to revert to this matter at its next meeting.

¶D. United States - Section 110(5) of the U.S. Copyright

¶20. The United States noted that it will work with the U.S. Congress and confer with the EC to reach a mutually satisfactory resolution of this matter. Noting its strong record of intellectual property rights protection, and other items on the agenda, the U.S. said that the EC was not in a position to "lecture" other Members about agreements being "one-way".

¶21. The European Communities replied that the U.S. was the only Member on the agenda which has twice failed to comply with its TRIPS Agreement obligations within the reasonable period of time established to do so; this was *res ipsa loquitur*. The U.S. is doing little if anything to address the issue of "substandard" IP protection in the copyright field. The self-proclaimed champion of IPRs seems "impotent" to live up to its TRIPS obligations. The EC recalled that should the U.S. not work to resolve this matter it has reserved its right to reactivate arbitration on retaliation.

¶22. The DSB took note of the statements and agreed to revert to this matter at its next meeting.

(2) European Communities - European Subsidies on Sugar: Implementation of the DSB Recommendation and Rulings

¶A. Communications from Australia, Brazil and Thailand

¶23. Australia recalled that while the DSB recommendations and rulings in this dispute require the EC to reduce its sugar exports, the EC's declassification of quota sugar to C sugar, which occurred during the implementation period, will actually increase EC sugar exports. An implementation period does not serve as a "license to unilaterally waive" or an "open season for the non-application of" WTO obligations during that period. The EC's actions, if replicated, would undermine the security and predictability of the WTO dispute settlement system and could destabilize the world sugar market. Declassification is harmful, rather than necessary or conducive, to implementation.

¶24. Brazil reiterated that EC's obligations to reduce its sugar exports and stated that the EC's decision to declassify will have the opposite effect. This action is in breach of Articles 3.3 and 21.1 of the DSU, Article XVI:4 of the Marrakesh Agreement, and the principle of good faith. The RPT was not a *carte blanche* for the implementing Member. Referring to the agriculture negotiations, it noted the negative signal sent by the EC less than three months from the Hong Kong Ministerial.

¶25. Thailand stated that the EC's declassification decision increases its sugar exports (already in excess of levels permitted by the WTO) in the face of DSB recommendations and rulings requiring a decrease, which in turn will adversely affect world sugar prices. The EC's action runs counter to its obligation to begin to implement the DSB's recommendations and rulings.

¶26. The European Communities stated that an "ambitious" proposal entailing a comprehensive reform of the EC sugar regime is currently being discussed in the EC Council and Parliament. Until the new regime is in place, the EC must apply its existing rules which include requirements on the declassification of quota sugar. While noting that its efforts to comply with the DSB's recommendations and rulings are underway, the EC insisted on a reasonable period of time to do so. As defined by the DSU, implementation during that period is a legislative process involving the elimination of legal flaws and, in the present dispute, does not require a gradual reduction of WTO-inconsistent sugar exports to zero. Until the legislative process is complete, the old legal rules continue to apply.

127. The DSB took note of the statements.

(3) United States - Countervailing Measures  
Concerning Certain Products from the European  
Communities: Recourse to Article 21.5 of the DSU  
by the European Communities

1A. Report of the Panel (WT/DS212/RW)

128. The European Communities discussed various aspects of the report, noting in particular the panel's finding that in a sunset review process involving privatization information, the investigating authority is obliged under the SCM Agreement to examine whether the privatization was at arm's length and fair market value. Likewise, investigating authorities must take account of all the evidence placed on its record in making its determination of likelihood of continuation or recurrence of subsidization. Refusal to consider new evidence is inconsistent with Article 21.3 of the SCM Agreement. The EC did not, however, agree with the panel's findings with respect to "measures taken to comply" and privatization analyses being based on the companies as a whole. The EC requested the adoption of the report.

129. The United States welcomed the panel's findings that: (1) certain shares in a French company at issue were not privatized at arm's length or for fair market value; and (2) investigating authorities need not reconsider the likelihood of continuation or recurrence of injury merely because the DSB's recommendations and rulings require reconsideration of the likelihood of continuation or recurrence of subsidization. It questioned the panel's findings regarding the UK and Spanish reviews as they pertained to the application of the U.S. privatization analysis. With respect to the UK review, it did not agree with the panel's finding that the U.S. should have considered certain evidence that was presented to it for the first time during the implementation of the DSB's recommendations and rulings. With these exceptions, the panel report was overall very positive and well-reasoned.

130. The DSB took note of the statements and adopted the panel report.

(4) European Communities - Customs Classification of  
Frozen Boneless Chicken Cuts

1A. Report of the Appellate Body and Reports of  
the Panel

131. Brazil and Thailand commented on the report and called on the EC to implement immediately. Thailand also noted that the panel and Appellate Body reports demonstrate that "the rule-based multilateral trading system works - and works well - for developing countries."

132. The European Communities said that while the Appellate Body accepted several of the EC's criticisms of the panel report, the Appellate Body ignored a number of the EC's arguments as well. The EC did not support either the Appellate Body's explanation of the structure of Chapter 2 of the Harmonized System or its findings on the object and purpose under Article 31(1) of the Vienna Convention on the Law of Treaties. It found the Appellate Body's reasoning with regard to classification practice equally unpersuasive. Although the EC was satisfied with the Appellate Body's interpretation of the term "subsequent practice" found in Article 31(3)(b) of the Vienna Convention, that interpretation was undermined by the Appellate Body's application of Article 32 of the Convention. For these reasons, the EC could not support the adoption of this report.

133. Japan commented on paragraph 199 of the Appellate Body report, noting that the Appellate Body's interpretation of Article 31(2)(a) of the Vienna Convention was unnecessary with respect to its deliberations on whether the Harmonized System was context for the purpose of analyzing the EC's schedule of tariff concessions.

134. The United States considered several aspects of the panel and appellate Body reports to be well-reasoned, agreeing with the panel's and Appellate Body's conclusions that two measures that post-dated the panel request were not within the panel's terms of reference. It also appreciated the Appellate Body's approach on: (1) whether the EC's classification practice in this dispute could by itself constitute "subsequent practice" for the purposes of an analysis of context, as set forth in Article 31(3)(b) of the Vienna Convention; (2) whether classification practice and other acts of Members might be relevant for a panel's analysis in other ways, as supplementary means of interpretation under Article 32 of the Vienna Convention; and (3) whether and how panels should consider judgments of the domestic courts of a Member. However, the United States found some of the discussion concerning "object and

purpose" troubling, particularly the suggestion that panels could consider the object and purpose of individual treaty provisions, and the suggestion that "security and predictability" was itself an object and purpose of the WTO.

¶35. The DSB took note of the statements and adopted the panel and Appellate Body reports.

#### (5) Appointment of Appellate Body Members

¶A. Decision by the DSB on the Reappointment of Appellate Body Members

¶36. Citing DSU Article 17.2, the Chairman said that Messrs. Baptista, Lockhart, and Sacerdoti had been appointed in December 2001 and that their terms would expire in December ¶2005. Having held consultations with Members over the past months, he noted that no delegation had objected to their continued membership and proposed that the DSB agree to their re-appointment.

¶37. Brazil thanked the chairman for his work on the re-appointment process and noted the general support for, and continued confidence in, these three Appellate Body members.

¶38. The Chairman proposed, and the DSB agreed, to reappoint Messrs. Baptista, Lockhart, and Sacerdoti each to a second four-year term as members of the Appellate Body.

¶39. Next meeting: The chair announced that the next regular meeting of the DSB would take place on Tuesday, October 18, ¶2005. The deadline for inscribing items on the agenda will be on Thursday, October 6. The airgram will be issued on Friday, October 7.

SHARK